environment. Whether this court chooses to align their ruling under *Tinker*, the Third Circuit or the Fifth Circuit, the outcome is the same because Price's post was made off-campus, is a mere expression of opinion that did not result in a material disruption, or include threatening, harassing, and intimidating language. For the following reasons, Price's post does not apply to the reasonably foreseeable or sufficient nexus test.

B. Even if *Tinker* applies to off-campus speech, Ford violated Plaintiff's First Amendment right because there was not a reasonable forecast of a substantial disruption and there was not a sufficient nexus between Plaintiff's post and the school's pedagogical interests.

In applying *Tinker* to off-campus speech, the Second and Fourth Circuits utilized two different standards, a reasonably foreseeable standard and a sufficient nexus test. For the following reasons, Plaintiff's counsel urges this court to find that neither tests apply to Price's post.

1. Plaintiff's post is protected by the First Amendment because the non-threatening, opinionated nature of the speech within the post and mention of "coach" and school colors is not a sufficient basis to reasonably lead Ford to forecast a material disruption.

Under the reasonably foreseeable test, school officials may discipline a student for their off-campus speech when their speech "would foreseeably create a risk of substantial disruption within the school environment, at least when it is similarly foreseeable that the off-campus expression might also reach campus." *Doninger*, 527 F.3d at 48. It is not necessary to determine whether actual disruption

will occur, "but whether school officials might reasonably portend disruption from the student expression at issue." *Id.* at 51.

Accordingly, facts and the totality of the circumstances of the students off-campus expression must reasonably lead school officials to forecast substantial disruption of or material interference with school activities or its learning environment. *See LaVine v. Blaine Sch. Dist.*, 257 F.3d 981, 989 (9th Cir. 2001) ("to suppress student speech, school officials must justify their decision by showing facts which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities"); *See also Doninger*, 527 F.3d at 53 (holding the facts indicate a reasonable forecast of material disruption because the student's intent on writing the speech was to entice others to speak out against the purported event cancellation); *Bell*, 799 F.3d at 387 (finding reasonable forecast of material disruption based on the threatening, harassing, and intimidating nature of the speech); *contra Shanley v. Northeast Independent Sch. Dist., Bexar Cty., Tex*, 462 F.2d 960, 974 (5th Cir. 1972); *Layshock*, 650 F.3d at 214 (holding student punishment unconstitutional because the facts did not support a reasonable forecast of disruption based on the student's use of the principal's picture on social media site and student's interaction with social media site did not give rise to the level of disruption required).

Courts consider the following factors for the totality of the circumstances: "nature and content of the speech, severity of the possible consequences should the speaker take action, relationship of the speech to the school, intent to keep speech private, seriousness of speech, manner in which the speech reached the school community and the occurrence of other in-school disturbances." *Bell*, 799 F.3d at 398.

Here, Price's post did not create a reasonable forecast of a material disruption. In order to justify Ford's disciplinary action, there must be facts and circumstances which might reasonably lead to the forecast of substantial disruption of or material interference with school activities. Dissimilar to *Doninger*, Price made an opinionated post to a private social media account because he did not intend for the post to reach the school and did not intend to take action or entice others to take action. Rather, Price intended on turning in the jersey form with his size. However, Ford never afforded Price the opportunity to turn in the jersey form because Ford preemptively disciplined Price based on his discomfort with the post and contention that a disruption would occur, despite the lack of factual circumstances indicating a reasonable forecast of material disruption. To say that a substantial and material disruption would occur from the opinion stated in Price's post would be stretching the reasoning of *Doninger* to include speech that is unpopular and creates discomfort, the exact speech *Tinker* precludes.

Under *Bell's* totality of the circumstances, Price's post does not reasonably forecast a material disruption because the facts show that only one student brought the post to Ford's attention, only two students confronted Price making minimal comments calling him "insensitive" and "stupid", and the post neither created nor was it calculated to create any disruption of school activities. Additionally, as *J.S.* and *Layshock* indicated, Price's mention of "coach" and school colors is not enough to reasonably forecast a material disruption.

Therefore, Price's post did not create a reasonable forecast of material disruption. As the facts indicate, Price intended on turning in his jersey form. Ford did not afford him this opportunity and took unjustified and unconstitutional disciplinary action against him. Given the totality of the circumstances, the post was created entirely off-campus, after school hours, without school resources, and Price never intended to take action or entice others to take action, thus, the facts do not support a reasonable forecast of material disruption occurred.

2. Price's post is entitled to First Amendment protection because limited connection mentioning "coach" and school colors is insufficient to forge a sufficient nexus between Plaintiff's off-campus speech and the school's pedagogical interests.

Applying *Tinker* to off-campus speech, the Fourth and Nineth Circuits set forth the sufficient nexus test which provides that, school officials are permitted to discipline students when the student's off-campus speech is sufficiently connected to the school's pedagogical interests. *See Kowalski*, 652 F.3d at 565; *C.R. v.*

Eugene Sch. Dist. 4J, 835 F.3d 1142, 1145 (9th Cir. 2016). Courts have used the sufficient nexus test to justify discipline of a student's off campus speech when the nature of the speech is harassing, bullying, threatening, or defamatory. *See Kowalski*, 652 F.3d at 574 (holding a sufficiently strong connection between the student's off-campus speech and the school's pedagogical interests to justify discipline because the student could reasonably expect her speech to reach the school given the targeted, defamatory nature of the student's speech, aimed at a fellow classmate, it created substantial disruption in the school. *See also Wisniewski v. Bd. of Educ. of Weedsport Cent. Sch. Dist.*, 494 F.3d 34, 38 (2d Cir. 2007) (finding a sufficient nexus between the school's pedagogical interest and the student's threatening depiction of killing a school official was sufficiently strong to justify action).

Conversely, Courts have found the sufficient nexus test inapplicable when the student's speech takes place off-campus and contains limited connection to the school because the limited connection is insufficient to forge a nexus between the off-campus speech and a substantial disruption at school. *See Layshock*, 650 F.3d at 214 (finding the student's use of the principal's picture on his off-campus social media post was too limited to sufficiently connect the speech to the school pedagogical interests); *See also Thomas v. Board of Educ.,* 607 F.2d 1043 (2d Cir.

1979) (holding that all but an insignificant amount of relevant activity regarding the student speech was designed off-campus).

Here, the nexus of Price's post to the high school's pedagogical interests is not sufficiently strong to justify action taken by Ford because Price's mention of "coach" and "ol' black and maroon" is too limited to establish a sufficient connection to the school's pedagogical interests. Unlike *Kowalski*, Price's post did not target a specified person and did not contain threatening, harassing, or defamatory language. Instead, Price's post presented an opinion with his discomfort for wearing pink while playing football and the mention of "coach" and school colors is not enough to forge a nexus between the off-campus speech and the school's pedagogical interests. Therefore, Price's post is entitled to First Amendment protection because the post does not satisfy the sufficient nexus test.

II. Ford is not entitled to qualified immunity because Price's First Amendment right to free speech right was clearly established at the time Ford's disciplinary action occurred and a reasonable person in Ford's situation would know a student has a right to make off-campus opinionated, non-disruptive, non-threatening, social media posts under the First Amendment right to free speech.

For the following reasons, Ford is not entitled to qualified immunity because the First Amendment right to free speech was clearly established at the time the disciplinary action occurred and a reasonable person would know a student has a right to freedom of speech under the First Amendment. The defense of qualified

immunity applies to government officials and "offers these individuals complete protection if their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Penley v. Eslinger*, 605 F.3d 843, 849 (11th Cir. 2010). A clearly established right is one that is sufficiently clear that every reasonable official would have understood that what he is doing violates that right." *Stamps v. Town of Framingham,* 813 F.3d 27, 33 (1st Cir. 2016). The Supreme Court established an objective-reasonableness test which provides "qualified immunity protection to all but the plainly incompetent or those who knowingly violate the law." *Courson v. McMillian*, 939 F.2d 1479, 1487 (11th Cir. 1991). To overcome the defense of qualified immunity, the plaintiff must prove: (1) that the defendant violated his constitutional right, and (2) that the constitutional right was clearly established at the time of the alleged unlawful activity. *Hunt v. Bd. of Regents of Univ. of New Mexico*, 792 F. App'x 595, 600 (10th Cir. 2019).

A. Plaintiff has a clearly established right under the First Amendment because the off-campus post was non-threatening and non-disruptive to the school environment.

Under the defense of qualified immunity, "a right is clearly established when, based upon the law at the time of the incident, it is sufficiently clear that every reasonable official would have understood that what he is doing violates that right." *Hunt* 792 F. App'x at 601. The application of *Tinker* as it relates to off-

campus speech is clear: student speech made off-campus is "protected under the First Amendment and not punishable by school authorities unless they are true threats or are reasonably calculated to reach the school environment *and* are so egregious as to pose a serious safety risk or other substantial and material disruption in that environment." *R.S. ex rel. S.S. v. Minnewaska Area Sch. Dist. No. 2149*, 894 F. Supp. 2d 1128, 1140 (D. Minn. 2012). See also *Sagehorn v. Indep. Sch. Dist. No. 728*, 122 F. Supp. 3d 842, 862 (D. Minn. 2015) (holding school officials were not entitled to qualified immunity because the student's off-campus speech was non-threatening and in no way impacts or disrupts the school environment and thus, the student had a clearly established right to freedom of speech).

Consequently, there is not a clearly established right to First Amendment protection for off-campus student speech that results in an actual or substantial disruption of the school environment. *See Doninger*, 527 F.3d at 52 (holding that the student's off-campus internet post "created a foreseeable risk of substantial disruption to the work and discipline of the school" because the content of the post enticed fellow students to take action against the purported school event cancellation). Additionally, a student does not have a clearly established right to freedom of speech when they limit their speech, either intentionally, by contract, or inadvertently, by conduct. *See Longoria Next Friend of M.L. v. San Benito Indep.*

Consol. Sch. Dist., 942 F.3d 258, 263 (5th Cir. 2019) (student agreed, in writing, that her off-campus social media posts would be subject to disciplinary action under the Cheerleading Constitution, and because of this the student did not have a clearly established right to free speech); See also *Yeasin v. Durham*, 224 F. Supp. 3d 1194, 1199 (D. Kan. 2016) (student did not have a clearly established right to freedom of speech because the school issued the student a no contact letter which prohibited comments on any social media account about a particular student, the letter further provided that any violation may result in expulsion).

Here, Price has a clearly established right to freedom of speech under the First Amendment of the Constitution. The facts of this case place Price's post in the category of protected, nonviolent, nondisruptive, off-campus speech because the post merely indicates Price's opinion of not wanting to wear pink while playing football. As stated by *R.S.*, student speech made off-campus is protected under the First Amendment and not punishable by school authorities unless they are true threats or are reasonably calculated to reach the school environment *and* are so egregious as to pose a serious safety risk or other substantial disruption in that environment.

Dissimilar to *Doninger*, Price has a clearly established right to free speech because Price never intended for the post to reach the school and did not encourage others to cause a disruption in school. In contrast to *Longoria* and *Yeasin*, Price did

not limit his First Amendment right to free speech by contract or unlawful conduct. Similar to *Sagehorn*, Price's off-campus social media post is non-threatening and in no way impacts or disrupts the school environment. Thus, Price has a clearly established right to freedom of speech. The facts of this case show that Price's post took place entirely off-campus, and there was not a reasonable forecast of material disruption to the school environment as a result of the post or a substantial and material disruption caused by the post. Therefore, given the non-threatening, non-disruptive nature of Price's off-campus opinionated post, Price has a clearly established right to freedom of speech.

B. A reasonable person in Ford's position should have known that the disciplinary action taken against Price would violate his constitutional right to freedom of speech because the speech was opinionated, non-disruptive and did not involve school safety.

The defense of qualified immunity requires the court to determine if, objectively, a reasonable person in the defendant's position should know about the constitutionality of the conduct the school official is disciplining. *Doninger*, 642 F.3d at 345-46. In assessing the reasonableness of the official's actions, the official's action must be viewed in light of the "facts available to him at the time of his action and the law that was clearly established at the time of the alleged illegal acts." *Porter v. Ascension Par. Sch. Bd.*, 393 F.3d 608, 614 (5th Cir. 2004).

The general rule for a student's First Amendment right to free speech on the internet is "that schools cannot regulate merely inappropriate out-of-school speech,

and reasonable school official would understand that punishing student's use of personal property to make non-threatening off-campus speech that in no way impacted or disrupted school environment would violate student's clearly established right." *Sagehorn*, 122 F. Supp. at 862. In *Sagehorn*, school officials were not entitled to qualified immunity and the court found that "a reasonable school official would understand that punishing such speech would violate the students clearly established right" to free speech because the nature of the speech is non-threatening and "in no way impacts or disrupts the school environment." *Id.* at 862. *See Doninger*, 642 F.3d at 344 (while a student's right to free speech may be limited in light of the special characteristics of the school environment, a student's right to free speech beyond the schoolhouse gates is protected by under the First Amendment when the speech does not substantially and materially disrupt the school environment). *See also Morse*, 551 U.S. at 394 (quoting *Fraser*, 478 U.S. at 682) (holding that had the student delivered the same speech in a public forum outside the school context, he would have been entitled to First Amendment protection. "In school, however, his First Amendment rights were circumscribed in light of the special characteristics of the school environment").

Accordingly, case law supports the proposition that "coaches may not penalize players for engaging in speech activity which does not create substantial disorder, materially disrupt class work, or invade the rights of others." *Seamons v.*